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THE COMMON LAW.*

The Common Law is like a rich seam of precious metal lying deep below the surface of the life of Britain, and this rich seam outcrops again in the North American Continent, and has there been worked and assayed and refined and applied by diligent and skillful toilers in nearly every province of Canada and nearly every state of the Union, for the progress and development of mankind. It has overcome distance and withstood the assaults of time. I do not forget that in the early days of the American Republic there was a movement to repudiate the Common Law on the ground that it came from England. It would be as reasonable for Americans to repudiate the game of golf because it comes from Scotland; instead of which the authors of your independence lost no time in making a tee-shot into Boston harbor, and naming one of your early battlefields Bunker Hill. And, indeed, the Common Law, as you and I understand it, is not some British institution which has been imposed or foisted upon Americans, it is the common possession of both countries, which has been preserved and developed by the energies and the intelligence of each; and certainly no nation owes more to its lawyers than does this great Republic. When the French Revolutionists killed the famous scientist Laveisier they shouted, "The Republic has no need of chemists," but the founders of the American Republic made no such mistake about lawyers. Of the 56 signatories to your Declaration of Independence no less than 25 were lawyers; while of the 55 members of the Federal Constitutional Convention 31 were lawyers. It will be true, I think, to say that in these great acts of constructive statesmanship, lawyers played as large a part in America in the Eighteenth

*Address by Sir John Simon, K. C., of London, before the American Bar Association at Cincinnati, August 31, 1921.

Century as they had done in England in the Seventeenth. And now that the light of history shines high in the heavens and has dispelled the mists of prejudice and passion, let us admit that in both cases it was the devotion of lawyers to constitutional liberty which laid broad and deep the foundations of the two governments.

We must not forget that the Common Law at the end of the Eighteenth Century was as yet undeveloped in many of its modern applications. Save for the luminous and comprehensive Treatise of William Blackstone there was hardly a law book which could be described as attractive reading. Coke on Littleton I have always regarded as a repulsive authority, and the Eighteenth Century Digests were presumably so called because their contents were quite indigestible. Coke, indeed, claimed that the Common Law was "the perfection of reason;" but a system which punished witchcraft by fearful penalties; which ascertained whether a man was mute by malice or by visitation of God, by piling weights upon his body heavier than he could bear to see whether he would cry out, and which chiefly concerned itself with the incidents of feudal tenures and the niceties of written pleadings, may well have seemed unsuited to the needs of the vigorous and progressive Republic of America. All honor, then, to the lawyers of this Nation who realized that there was precious gold hidden beneath this dross and who extracted from the ancient Common Law so many of those modern applications which have made it the basis of the jurisprudence of the English speaking world.

It is instructive and interesting to observe how far during the last 150 years lawyers in the two countries, building independently upon the same foundation of the common law have erected a corresponding structure. The world in which the common law had its roots, knew nothing of modern methods of transportation or communication, and it remained to be seen whether the ramifications of banking and insurance and every form of business could be served by new applications of ancient principles. It is a wonderful proof of the truly scientific character of law that alike in the old world and in the new, judges and lawyers trained in the same school should have the same solution for the

same difficulties. The works of Joseph Story who, knowing the bearings of every case, navigated from headland to headland, and the judgment of John Marshall who was like a mariner with a compass by which he could find his way across uncharted seas so as to proceed straight across to the desired and destined haven, may almost be said to be "familiar as household words" to a trained English lawyer. It is one of my earliest recollections of the practice of the law how the English Court of Appeals was convinced by reference to a chapter in Mr. Justice Holmes' profound and masterly analysis of the Common Law, that a previous decision of the English High Court was wrong, and that the true principle was to be found expounded in his luminous treatise. And, just before I left England, I was arguing before the House of Lords the question whether, what we call "bonus shares," and you call "stock dividends," were liable to income tax, and I had the satisfaction both of winning my case and of establishing the true principle of law largely by means of citing a recent judgment of Mr. Justice Pitney in the Supreme Court of the United States.

Equally remarkable is the development in the two countries, side by side, of that branch of the law which deals with personal rights. An interesting book might be written by an English lawyer and an American lawyer, jointly, comparing and contrasting provisions for securing the rights of married women, for protecting children, for enabling the insolvent debtor, who has done his best but is overwhelmed by misfortune, to make a fresh start instead of languishing in a debtor's prison, for admitting parties in civil and criminal cases as witnesses in their own behalf, and for removing disabilities of sex. We have at length followed the American lead in throwing open the profession of the law to women, and the first woman barrister will shortly be called at the Inns of Court. But if I may judge from the aspect of this audience, it would appear that women lawyers, like others of the sex, having received acknowledgment of their rights, are not always concerned to take full advantage of them.

I think it will be found, if a comparison were made, that the main differences between the private law of England and America are more in the region of practice and procedure than in the realm

of substantive rights. Nearly fifty years ago we swept away the distinction between law and equity, and it may fairly be said that the existing system in England is one which does not deprive a man of his rights because he has come to the wrong court. The old system of pleading has been abolished, with the result that more simplicity has been introduced into the preliminaries of trial, though with a sacrifice of precision which many of the best English lawyers realize to be a misfortune. So far as England is concerned, the challenge of a juryman is practically unknown, and we have not found it necessary to inquire into the antecedent knowledge of the jury, but have thought it sufficient to rely upon their sense of responsibility as citizens. The use of juries, however, has much decreased of late, and though for my part I think twelve jurymen much the best tribunal to give a competent decision on insoluble problems, such as the amount of damages which should be given for a broken leg, or rendered to a lady who has lost her husband in a railway accident, and married again, there is an undoubted tendency in the old country to dispense with their assistance in cases which formerly would have required it. But I think the main claim which an English lawyer would seek to make in favor of his own procedure is on the score of speedy trial. Justice delayed is justice denied, and though our circuit system sometimes leaves an accused person in custody for as much as two or three months before his case is heard, the trial itself is carried through without other delays, the opportunities for appeal are circumscribed, we have abolished much of the technicality which formerly offered a way of escape for the guilty, and the carrying out of the sentence promptly follows conviction. In civil cases great efforts have been made to avoid delay and it is possible in our commercial courts to have a case tried within a few weeks or at most a few months of the issue of the writ.

But these differences are all differences of detail in which each country may have something to teach and something to learn. The great fact is, that English law and American law, derived from the same origin, are pursuing the same goal, and in our intercourse with one another we are realizing more completely the solidarity of the friendship of the English-speaking world.

What are the unseen but unshakable foundations upon which Anglo-American friendship rests? It is a friendship the peaceful continuance of which over a full century of time we were preparing to celebrate in that year of destiny 1914. It is a friendship which since that date has been cemented and consecrated in the valley of the shadow of death; by heroic suffering and triumphant effort in a common cause. In Flanders and in France British and American dust lies mingled. Both nations share, in the immortal words of Abraham Lincoln, in the solemn pride that is theirs to have laid so costly a sacrifice upon the altar of freedom. These young lives, so boldly offered, and so bravely surrendered, are at once a token and a pledge. They are a token of that unity of spirit pervading alike this young nation and the old land from whose loins she sprang, which no width of ocean could divide and no memory of ancient feud could destroy. And they are a pledge for the future of Anglo-American friendship and thereby for the peace of the world. Love of Liberty, a joint Literature, the same Language, and the Common Law—these are the four Evangelists of the Gospel of Anglo-American friendship; these are the Big Four who can best guarantee that hands will be stretched across the sea and grasped in a common resolve to save those for whom this stupendous sacrifice was made from a renewal of strife. And among these influences which make for the reconciliation of mankind and the saving of humanity from the unspeakable horrors of armed conflict, Law, in its highest and broadest sense, is one of the chief. It is the instrument of Justice; it is the hand-maid of Order; it is the guarantor of Individual Right; it is the arbiter of Dispute and the reconciler of Difference; it is the cement which binds together the fabric of human institution; it is the standard which society erects to guide those that are tempted; to recall to the true path those who are led astray and to symbolize the fact that each one of us cannot live for himself but must serve and work for the common good. Let us, then boldly proclaim our pride in this great profession; our resolve to bring no dishonor upon its escutcheon and our belief in the value of the contribution which it may make to the future advancement of the world.